No. 16,349

IN THE

United States Court of Appeals

For the Ninth Circuit

MARY C. HUDSON, as Administratrix of the Estate of Herbert A. Hudson, Deceased,

Appellant,

vs.

TRANSOCEAN AIR LINES, a Corporation, and SLICK AIRWAYS, INC., a Corporation,

Appellees.

BRIEF FOR APPELLANT.

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Appellees.

BRIEF FOR APPELLANT.

The appeal is by the libelant Mary C. Hudson, as Administratrix, from an adverse decree in a suit in admiralty to recover damages for wrongful death occurring on or over the high seas.

STATEMENT OF JURISDICTION.

Paragraphs VII, VIII and IX of the libel in the court below alleged that the death of libelant's intestate and husband, Herbert A. Hudson, was caused by the wrongful act or neglect of respondent, Transocean

Air Lines, occurring on the high seas between Guam and the continental United States, and more than a marine league from shore. T. 5-6. The Death on the High Seas Act (41 Stat. 537, 46 U.S.C. Sec. 761-767) and Sec. 1333 of Title 28 U.S.C. therefore sustain the jurisdiction of the District Court.

The final decree of the District Court granting respondent's motion for summary judgment was entered December 18, 1958. T. 41-42. Notice of appeal from such decree and order to this court was filed January 8, 1959. T. 43. Accordingly, the appeal was timely. 28 U.S.C. 2107. Jurisdiction of this court to review the final decree of the District Court is sustained by 28 U.S.C., Sec. 1291, 1294.

STATEMENT OF THE CASE.

The libel alleges that decedent Hudson was killed on July 12, 1953, while employed as a co-pilot by respondent on a plane which crashed while en route from Guam to the United States. T. 5.

The libel further alleges that the plane crashed because of the neglect of respondent, T. 5-6, and that such neglect was the proximate cause of the death of Hudson. T. 6.

The libel then asserts that Administratrix, Mary C. Hudson, and her children, as the heirs at law of Hudson, sustained certain pecuniary damage and are entitled to recover the same against respondent. T. 6-7.

Respondent's answer admits the happening of the crash, denies any neglect or wrongful act, and asserts certain special defenses. T. 9-17. Among the special defenses is the allegation that following the accident the heirs of Hudson applied for and received compensation under the laws of the State of California and are, accordingly, barred by such application and award. T. 13-14.

Respondent and appellant further entered into a certain stipulation of facts (T. 18-23), agreeing that prior to his death Hudson was a member of the Air Carrier Pilots Association International, and agreeing that a contract between such association and respondent was executed in 1952 providing for certain compensation benefits under California law, and that such agreement was in effect at the time of the death of Hudson (T. 19-20). The stipulation of fact further concedes the receipt of such compensation by the heirs at law (T. 22).

Following the filing of the stipulation of fact, and on October 17, 1958, respondents filed motion for summary judgment (T. 38-39). On December 18, 1958 the District Court granted such motion and entered final decree against appellant (T. 41-42).

The District Court filed no opinion and cited no authorities in connection with its order, simply stating in the order that "recovery by libelant in this action is barred by reason of the California Workmen's Compensation Act. . . ."

SPECIFICATION OF ERRORS.

1. The District Court erred in granting the motion of respondent for summary judgment.

2. The District Court erred in decreeing that libelant take nothing and that respondent take judgment against libelant.

3. The District Court erred in holding that libelant's action is barred by the California Workmen's Compensation Act.

4. The final decree is against law.

ARGUMENT.

1. THE AWARD OF BENEFITS BY THE CALIFORNIA INDUSTRIAL ACCIDENT COMMISSION AND THE ACCEPTANCE OF SUCH BENEFITS BY LIBELANT DO NOT CONSTITUTE A BAR TO THIS ACTION.

The respondent did not, in its motion, specify any reliance upon the doctrine of election of remedy, nor estoppel, and the District Court in granting the motion made no mention of the acceptance of the California compensation benefits as being a basis for its ruling. Libelant assumes that the holding of the District Court was based upon the court's opinion that the State Compensation Act was the exclusive remedy, and that whether or not benefits were accepted is immaterial. Nevertheless, libelant desires to call this court's attention to the fact that previous decisions of the federal courts, including a decision by this court, have universally held that prior application for state benefits is not a fact to be considered in de-

termining whether state or federal law controls. For example, see *Western Boat Bldg. Co. v. O'Leary,* 198 Fed. 2d 409 (9th Cir. 1952), and *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne,* 192 Fed. 2d 968 (4th Cir. 1951).

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2. THE SUMMARY JUDGMENT FOR RESPONDENT SHOULD BE REVERSED FOR THE REASON THAT THE FEDERAL DEATH ON THE HIGH SEAS ACT CONSTITUTES THE SOLE AND EXCLUSIVE REMEDY APPLICABLE TO THE FACTS OF THIS CASE. Specification of Errors Nos. 1, 2, 3, 4.

The Death on the High Seas Act was enacted in 1920. 41 Stat. 537, 46 U.S.C., Sec. 761-767. Sections 1 and 2 of the Act (41 Stat. 537, U.S.C., Sec. 761, 762) provide:

> "Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." (46 U.S.C., Sec. 761.)
>
> "Sec. 2. The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they

> may severally have suffered by reason of the death of the person by whose representative the suit is brought." (46 U.S.C., Sec. 762.)

It is clear that the act applies to airplane accidents as well as to shipboard accidents. Earlier decisions in the district courts so held. *Noel v. Linea Aeropostal Venezolana,* 154 F. Supp. 162; *Wilson v. Transocean Airlines,* 121 F. Supp. 85. The rule followed in these cases has now been approved in this circuit in *Trihey v. Transocean Air Lines, Inc.,* 255 Fed. 2d 824. In *D'Aleman v. Pan American World Airways,* 259 Fed. 2d 493, the second circuit has recently emphatically held that the act applies to airplanes just as to ships. In so holding, the court stated:

> "The facts of the case now before the court make a direct ruling on the question appropriate. To give to passengers on ships protection of the Act and deny similar rights to passengers in the air (496) would amount to unjustifiable and highly technical determination.
>
> (1) We, therefore, now hold that the Death on the High Seas Act grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high seas and that the trial court properly heard the case in admiralty."

Assuming, as we must, that the District Court, in dismissing this case, was conversant with the *Trihey* decision (supra), it appears that its holding would make a clear distinction between passengers and employees. The existence of a compensation act in the

particular state where the employee lived would apparently be of paramount importance in the view of the District Court.

If there are 50 different compensation laws in each of our states, then apparently the District Court would hold these laws controlling in any given airplane accident on or over the high seas. It further appears that this reasoning would not be applied as to state death acts where a passenger is concerned. This appeal has been brought because appellant believes this sort of ruling and reasoning cannot be justified under any previous decisions of the Supreme Court or the various U. S. Courts of Appeal.

In *King v. Pan-American World Airways,* 166 Fed. Supp. 136, the District Court, speaking through Judge Goodman, makes precisely the same ruling as the court in this case. May we take the liberty of quoting from Judge Goodman's earlier decision in *Wilson v. Transocean Air Lines* (supra), wherein it was held that the Act applied to an airplane passenger:

> "It is clear that the scope of the Death on the High Seas Act, within the geographical area of its operation, was intended to be as broad as the traditional tort jurisdiction of admiralty. As has been noted, the purpose of the Act was to afford a uniform right of action for death resulting from wrongful acts within the admiralty jurisdiction, excepting state territorial waters. The extent of the right of action given by the Act is not defined in terms of the nature of the wrongful act causing death, but solely in terms of the *locale of the act.*"

In the *Wilson* decision Judge Goodman further makes an exhaustive outline of the historical and congressional facts and proceedings leading to the passage of the Act in 1920. Again and again this decision points out the exclusive nature of admiralty jurisdiction and the basic reason for the creation of admiralty law, to wit, the establishment of a uniform system of laws in any locale embraced within the scope of admiralty jurisdiction.

In the *King* case (supra) these fundamental rules are somehow by-passed. As we understand the court's reasoning, it is held that airplane employees over the high seas should be classified in the same manner as certain waterfront employees whose duties bear only a questionable or tenuous relationship to navigation and commerce.

In support of its position, the District Court cites some five decisions, four by the Supreme Court, and one by this court. They are as follows: *Alaska Packers v. Industrial Accident Commission,* 294 U.S. 532, 79 L.Ed. 1044; *Grant-Smith-Porter Co. v. Rohde,* 257 U.S. 469, 66 L.Ed. 321; *Miller's Indemnity Underwriters v. Braud,* 270 U.S. 59, 70 L.Ed. 470; *Alaska Packers Assn. v. Industrial Accident Commission,* 276 U.S. 467, 72 L.Ed. 656, and *Alaska Packers Assn. v. Marshall,* 95 Fed. 2d 279.

A brief review of the facts of these five cases clearly shows that they were all concerned with accidents occurring to employees engaged in typical ship-shore employment. They were cases coming within what

the Supreme Court has called "the twilight zone". See *Davis v. Department of Labor and Industries,* 1942, 317 U.S. 249, 87 L.Ed. 246.

Indeed, in the *Marshall* case (supra), which was the only one of the cases actually concerned with an accident in open water, this court said:

> "Here is no commercial vessel sailing on the high seas carrying freight or passengers, or both, from port to port, where if local law applied, the relationship of seamen to owner would vary, maybe half a dozen times in the course of a voyage."

In the *Rohde* case (supra) an employee was injured while working on a partially completed vessel standing in a shipbuilding plant. The Supreme Court said:

> "Neither Rohde's general employment, nor his activities at the time had any direct relation to navigation or commerce. . . . The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and any tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."

In the *Braud* case (supra), a diver sawing timbers on an abandoned set of ways once used for launching ships in the Sabine River was killed. The Supreme Court said:

> "We said that the cause was controlled by the principle that, as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by state statutes."

But, then, referring to other cases concerned with ship-shore accidents (*Great Lakes Dredge & Dock Co. v. Kierejewski,* 261 U.S. 479, 67 L.Ed. 756; *Washington v. W. C. Dawson & Co.,* 264 U.S. 219, 68 L.Ed. 646; *Gonsalves v. Morse Dry Dock,* 266 U.S. 171, 69 L.Ed. 228; *Robbins Dry Dock v. Dahl,* 266 U.S. 449, 69 L.Ed. 372) bearing a little closer relationship to navigation and commerce, the court said:

> "We had occasion to consider matters which were not of more local concern because of their special relation to commerce and navigation and held them beyond the regulatory power of the state."

In the *Alaska Packers v. Industrial Accident Commission* case of 1928, 276 U.S. 467, 72 L.Ed. 656, the Supreme Court, in applying the California Compensation Act, said:

> "When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character."

(In that case a cannery worker was injured while standing on shore attempting to shove a boat into the water, intending to take it to a nearby dock for winter storage.)

A comprehensive and more recent summary of the Supreme Court decisions relating to "twilight zone" workers may be found in the previously cited decision of *Western Boat Bldg. Co. v. O'Leary.* Certainly

great difficulty exists in establishing jurisdiction in many of these types of accidents, there being no precise measure as to locale or type of work. On the other hand, in this action the Death on the High Seas Act has prescribed an exact measure, to wit:

> ". . . beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States. . . ."

If we are to take into account, as the District Court apparently feels we should, the nature of Hudson's duties, then what more direct connection to navigation and commerce can there be than the actual piloting of the airship over the high seas?

Here a plain and apparently all-inclusive federal law has set forth a specific remedy for death occurring because of negligence on the high seas. This court and other federal courts have held that airplane crashes are to be considered as coming within the meaning of the act. No other federal legislation appears to provide a different or alternative remedy.

It will be seen that historically the Supreme Court has jealously guarded the exclusive control of all admiralty matters by federal laws and federal courts. Even in the so-called "twilight zone" cases, cited above, involving waterfront accidents, the court has twice declared unconstitutional acts of Congress attempting to place jurisdiction under control of state compensation laws. See *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 64 L.Ed. 834 (1920), and *Washington v. Dawson & Co.,* 264 U.S. 219, 68 L.Ed. 646 (1924).

Appellant feels that this case presents an even more obvious situation where state laws cannot be constitutionally applied. Not only are the facts clearly concerned with the subject matter of admiralty, commerce and navigation, but here we have a specific law of the United States exactly defining the scope of its application. Recent decisions of the Supreme Court relating to litigation under the Federal Employers' Liability Act (45 U.S.C.A. 51, et seq.) and the Jones Act (46 U.S.C.A. 688, et seq.) demonstrate that federal jurisdiction will be applied even in close or borderline cases. See *Reed v. Penn. Ry. Co.,* 76 S.Ct. 958, 351 U.S. 502, 100 L.Ed. 1366; *Southern Pac. Co. v. Gileo,* 76 S.Ct. 952, 351 U.S. 493, 100 L.Ed. 1357; *Senko v. LaCrosse Dredging Co.,* 352 U.S. 370, 1 L.Ed. 2d 404, 77 S.Ct. 415.

CONCLUSION.

Appellant therefore respectfully submits that the summary judgment in favor of respondent should be reversed and the District Court directed to hear and determine this suit in admiralty.

Dated, Oakland, California,
May 12, 1959.

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SHERIDAN DOWNEY, JR.,
Proctors for Appellant.